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OPINION	:	No. 13-403
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THE HONORABLE ANITA GRANT, COUNTY COUNSEL, COUNTY OF LAKE, has requested an opinion on the following question:

Does Proposition 26 require voter approval before a county board of supervisors may enact an ordinance that would require a cable television franchise holder providing service in the county to pay a “public, educational, and governmental access fee,” equal to one percent of the “holder’s gross revenues,” to the county as authorized under California’s Digital Infrastructure and Video Competition Act?

CONCLUSION

Proposition 26 does not require voter approval before a county board of supervisors may enact an ordinance that would require a cable television franchise holder providing service in the county to pay a “public, educational, and governmental access fee,” equal to one percent of the “holder’s gross revenues,” to the county as authorized under California’s Digital Infrastructure and Video Competition Act.

ANALYSIS

We are again confronted with the question whether a particular governmental charge constitutes a “tax,” which under the state Constitution must be approved by the voters.¹ In this instance, a county proposes to enact an ordinance that would require a cable television company to pay the county a fee—based on a percentage of the company’s gross revenues—that is authorized under state and federal law to fund and support public, educational, and governmental access programming. We conclude that such a fee is not a “levy, charge, or exaction . . . imposed by a local government” so as to constitute a local tax within the meaning of the relevant state constitutional provisions. We explain our reasoning in greater detail below.

Constitutional requirements of voter approval

Beginning in 1978, California voters passed a series of initiatives amending the state Constitution to limit state and local authority to increase taxes. The first of these, Proposition 13, consisted of an “interlocking ‘package’” intended to provide real property tax relief.² Proposition 13 added new constitutional article XIII A, which contains “a real property *tax rate* limitation (§ 1), a real property *assessment* limitation (§ 2), a restriction on *state* taxes (§ 3), and a restriction on *local* taxes (§ 4).”³ Sections 1 and 2 limit property taxes directly. Sections 3 and 4 restrict the raising and imposition of other taxes and levies that might be used to replace the lost property taxes: section 3 requires that any new or increased state taxes be approved by two-thirds of the Legislature, and section 4 requires that any locally imposed “special taxes” be approved by two-thirds of the voters in the affected district.⁴

In 1996, finding that local governments had “subjected taxpayers to excessive tax, assessment, fee and charge increases” that frustrated the purposes of Proposition 13’s voter-approval requirements, California voters passed Proposition 218.⁵ Proposition 218 added new constitutional articles XIII C and XIII D. Article XIII C requires that all taxes imposed by local governments be designated as “general” or “special” taxes.⁶ It defines a

¹ See, e.g., 94 Ops.Cal.Atty.Gen. 75 (2011).

² *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231 (*Amador Valley*).

³ *Ibid.*

⁴ *Id.* at pp. 220, 231; Cal. Const., art XIII A, §§ 1-4.

⁵ Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 2, Findings and Declarations, p. 108, available at http://repository.uchastings.edu/ca_ballot_props/1138/.

⁶ Cal. Const., art. XIII C, § 2, subd. (a).

general tax as “any tax imposed for general governmental purposes” and a special tax as “any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.”⁷ Article XIII C requires *all* local tax proposals to be submitted to the electorate, but general taxes must be approved by a majority vote, and special taxes must be approved by a two-thirds vote.⁸ Article XIII D places additional restrictions on the imposition of property taxes and assessments.⁹

Litigation ensued over whether certain governmental charges were taxes subject to legislative or voter approval, or fees exempt from such approval. For example, in *Sinclair Paint Company v. State Board of Equalization*, a paint manufacturer challenged the Childhood Prevention of Lead Poisoning Act of 1991, which allowed the state to collect funds from entities that contributed to environmental lead contamination.¹⁰ The California Supreme Court held that these funds were regulatory fees, not taxes requiring the approval of two-thirds of the Legislature. Recognizing that “the distinction between taxes and fees is frequently ‘blurred,’”¹¹ the Court reasoned that the charges were fees because they required “manufacturers and other persons whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community. Viewed as a ‘mitigating effects’ measure, it is comparable in character to similar police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.”¹²

The voters acted again in 2010, asserting that taxes had “continued to escalate,” and that state and local governments were “disguis[ing] new taxes as ‘fees’ in order to extract even more revenue from California taxpayers without having to abide by . . . constitutional requirements.”¹³ Proposition 26 amended the state Constitution to add a new definition of “tax.” It amended article XIII A to define a state “tax” as “any levy, charge, or exaction of any kind imposed by the State,” save for five enumerated exceptions.¹⁴ It similarly amended article XIII C to define a local “tax” as “any levy, charge, or exaction of any kind

⁷ Cal. Const., art. XIII C, § 1, subds. (a), (d).

⁸ Cal. Const., art. XIII C, § 2, subds. (b), (d).

⁹ *Silicon Valley Taxpayers’ Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443.

¹⁰ *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866, 869-870.

¹¹ *Id.* at p. 874.

¹² *Id.* at p. 877.

¹³ Ballot Pamp., Gen. Elec. (Nov. 2, 2010), text of Prop. 26, p. 114.

¹⁴ Cal. Const, art. XIII A, § 3, subd. (b).

imposed by a local government,” save for seven enumerated exceptions.¹⁵

It is this latter provision that we examine here, to determine whether a public access fee, authorized under federal law, assessed under California’s Digital Infrastructure and Video Competition Act, and paid by a cable franchise holder to the county in which the holder is operating, falls within its ambit. We thus turn to the origin of the public access fee in question.

Public-access programming fees

Cable companies operate under franchises that involve federal, state, and local governments. In the late 1960’s and early 1970’s, local governments began regulating cable companies through franchises to exercise control over access to public rights-of-way and easements.¹⁶ “A franchise, . . . , is an authorization, akin to a license, by a franchise

¹⁵ Cal. Const, art. XIII C, § 1, subd. (e). The exceptions enumerated in subdivision (e) are:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development; and

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

¹⁶ *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.* (1996) 518 U.S. 727, 788 (*Denver Area Consortium*) (conc. & dis. opn. of Kennedy, J.).

authority permitting the construction or operation of a cable system.”¹⁷ A franchise agreement sets out the cable operator’s rights and obligations, and “[f]rom the early 1970’s onward, franchise authorities began requiring operators to set aside [public] access channels as a condition of the franchise.”¹⁸

Despite the importance of local government involvement, the provision of cable television is governed first by federal law. In 1968, the Supreme Court confirmed the authority of the Federal Communications Commission (FCC) to regulate cable television under the Communications Act of 1934.¹⁹ The FCC has been given broad authority to act “as the ‘single Government agency’ with ‘unified jurisdiction’ and ‘regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.’”²⁰ Local jurisdictions played a significant role in the early days of cable regulation by awarding franchises to selected cable operators, resulting in what the FCC has called “a system of ‘deliberately structured dualism.’”²¹

Congress enacted the Cable Communications Policy Act of 1984 in an effort to clarify the roles of various government actors in cable regulation.²² This act “sought to balance two conflicting goals: ‘preserv[ing] the critical role of municipal governments in the franchise process,’ . . . , while affirming the FCC’s ‘exclusive jurisdiction over cable service, and overall facilities which relate to such service’”²³ As to public access programming in particular, federal law allows a franchising authority to require a cable operator to provide channel capacity for public access programming,²⁴ and the operator is prohibited from exercising editorial control over such programming.²⁵ The franchising authority is granted the power to enforce public access requirements.²⁶ Moreover, the

¹⁷ *Ibid.*

¹⁸ *Ibid.*; see also *id.* at p. 760 (plur. opn. of Breyer, J.) (noting that “cable operators have traditionally agreed to reserve channel capacity for public, governmental, and educational channels as part of the consideration they give municipalities that award them cable franchises”).

¹⁹ *United States v. Southwestern Cable Co.* (1968) 392 U.S. 157, 178.

²⁰ *Id.* at p. 168, internal footnotes omitted.

²¹ *Alliance for Community Media v. F.C.C.* (6th Cir. 2008) 529 F.3d 763, 767.

²² *Id.* at pp. 767-768.

²³ *City of New York v. F.C.C.* (D.C. Cir. 1987) 814 F.2d 720, 723, internal citations omitted.

²⁴ 47 U.S.C. § 531(b); *Denver Area Consortium, supra*, 518 U.S. at p. 790.

²⁵ 47 U.S.C. § 531(e).

²⁶ 47 U.S.C. § 531(c).

franchising authority may require, as part of the franchising process, that the cable operator assure that it will provide adequate public access “channel capacity, facilities, or *financial support*.”²⁷

Against this federal backdrop, California has its own laws governing the cable franchising process. Before 2007, cities and counties in California held the authority to award cable franchises,²⁸ resulting in varying franchise requirements and barriers to cable operators entering local markets.²⁹ Local governments typically negotiated the terms of each franchise, including the required financial support for public access programming, with the prospective cable operator.³⁰ To provide cable consumers with more choice, lower prices, and speedier deployment of new technologies,³¹ the Legislature passed the Digital Infrastructure and Video Competition Act of 2006 (Act),³² which transferred the franchising authority from local entities to the state.³³ But although the state now controls the awarding of cable franchises, the local entities in which cable services are provided retain a significant role in the process.

Most relevant here, the Act requires cable operators to designate a portion of their network for public access channels;³⁴ indeed, it requires franchise applicants to provide a sworn affidavit as part of the franchise application process affirming that they will “provide [public access] channels and the [public access fee] as required by Section 5870.”³⁵ In turn, the Act provides that “[a] local entity may, by ordinance, establish a fee to support PEG [public, educational, and governmental access] channel facilities consistent with federal law” and that “the fee shall not exceed 1 percent of the holder’s gross revenues.”³⁶ The franchise holder may then recover the amount of this fee from its subscribers “as a

²⁷ 47 U.S.C. § 541(a)(4)(B), emphasis added.

²⁸ Gov. Code, § 53066.

²⁹ Klatt, *Chapter 700: Statewide Cable Franchising Ends the Patchwork of the Past* (2007) 38 McGeorge L. Rev. 309, 312.

³⁰ See, e.g., Assem. Floor Analysis of Assem. Bill No. 2937 (2005-2006 Reg. Sess.) Sep. 5, 2006, pp. 8-9.

³¹ Pub. Util. Code, § 5810.

³² Stats. 2006, ch. 700, §§ 1-4 (Assem. Bill No. 2937); see Pub. Util. Code, §§ 5800-5970.

³³ Pub. Util. Code, § 5840, subd. (a).

³⁴ Pub. Util. Code, § 5870, subd. (a).

³⁵ Pub. Util. Code, § 5840, subd. (e)(1)(B)(iv).

³⁶ Pub. Util. Code, § 5870, subd. (n).

separate line item on the regular bill of each subscriber.”³⁷ With regard to this fee, an Assembly floor analysis of the bill in which the Act was passed explained that “[a]ll video service providers will be required to *continue* to provide monetary support for [public access programming operations] of up to 1% of gross revenue,” as they had done under the prior arrangement of negotiating local franchises with local government authorities.³⁸

The public access fee is not a local tax

If a local governmental entity opts to establish the public access fee described in the Act for the cable franchisee operating in its jurisdiction, does that fee constitute a local “tax” as defined in article XIII C that would require voter approval? For the reasons that follow, we conclude that it does not.

In examining this question, we apply the rules of constitutional interpretation, which “are similar to those governing statutory construction. In interpreting a constitution’s provision, our paramount task is to ascertain the intent of those who enacted it. To determine that intent, we look first to the language of the constitutional text, giving the words their ordinary meaning. If the language is clear, there is no need for construction.”³⁹ The issue here turns on whether the public access fee is, within the meaning of article XIII C, “a levy, charge, or exaction . . . imposed by a local government.”

Examining these terms, we see that to “impose” means to “establish or apply by authority; to establish or bring about as if by force,”⁴⁰ and thus the phrase “imposed *by* a local government” connotes that the local government is using its *own* authority or force to assess and require payment. But recall that the Digital Infrastructure and Video Competition Act requires franchise applicants to agree—as a condition of being granted a

³⁷ Pub. Util. Code, § 5870, subd. (o).

³⁸ Assem. Floor Analysis of Assem. Bill No. 2937 (2005-2006 Reg. Sess.) Sep. 5, 2006, p. 9, emphasis added. Indeed, the Act required at its inception that “[a]ll [preexisting] obligations to provide and support PEG [public, educational, and governmental access] channel facilities . . . shall continue until the local franchise expires, until the term of the franchise would have expired if it had not been terminated pursuant [another provision of the Act allowing operators to seek a state franchise], or until January 1, 2009, whichever is later.” (Pub. Util. Code, § 5870, subd. (k), referencing Pub. Util. Code, § 5840, subd. (o).)

³⁹ *Thompson v. Dept. of Corrections* (2001) 25 Cal.4th 117, 122, internal citations and quotation marks omitted.

⁴⁰ Merriam-Webster’s Collegiate Dictionary (10th ed. 1998) p. 583, col. 2.

cable franchise—to provide both public access channels and the funding to support them.⁴¹ When a local entity passes an ordinance to collect the public access fee,⁴² it is not imposing a charge on an individual or entity that would not otherwise be obligated to pay it. Rather, the local entity is making explicit the cable franchisee’s preexisting obligation to deliver and provide funding for public access programming, an obligation it freely assumed as part of the franchise application process.

Thus, we do not find this public access fee to be a “levy, charge, or exaction . . . imposed by a local government” within the meaning of article XIII C. The compulsion to pay it does not emanate from, and is therefore not “imposed by,” the local governments that have historically received this fee in exchange for granting franchises to cable operators who seek to operate within their jurisdictions. Instead, because the Digital Infrastructure and Video Competition Act shifted franchising authority to the state but left operational responsibility with local jurisdictions, we view the enactment of a local public access fee as the implementation of the right to enforce a franchise obligation. Although this enforcement right may now nominally rest with the state government franchisor that conditioned the franchise grant on the applicant’s promise to provide public access funding, we see the Act’s authorization of a local access fee as effectively transferring this right⁴³ to the local public entity that is tasked with ensuring that the promised public access funds are received and put to proper use. And, no matter which governmental entity actually enforces and collects the public access fee, we do not believe that article XIII C was intended to enable a cable operator to avoid an obligation that it voluntarily agreed to pay as a condition of being awarded a franchise. A local ordinance to enforce the payment of such an obligation is simply not a local “tax”—even under article XIII C’s broad definition of that term.

As several courts have noted in examining claims under article XIII A, it is easy to fall into the trap of concluding that if a particular amount collected by a governmental entity fails to meet the definition of a permissible “fee,” then, by “reverse logic,” it must be a tax.⁴⁴ Although these cases predate Proposition 26’s expanded definition of tax, the

⁴¹ Pub. Util. Code, § 5840, subd. (e)(1)(B)(iv).

⁴² Pub. Util. Code, § 5870, subd. (n).

⁴³ Pub. Util. Code, § 5870, subd. (n).

⁴⁴ E.g., *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 194 (“it is an analytical error to conclude ‘by reverse logic’ that if a regulatory fee does not meet the reasonable costs requirements of [Government Code] section 50076 that ‘it must be a special tax.’ . . . In short, California Constitution, article XIII A does not apply to every regulatory fee simply because, as applied to one or another of the payor class, the fee is disproportionate to the service rendered”); *Alamo Rent-A-Car, Inc. v. Bd. of Supervisors*

admonition is still relevant: it is easy, but wrong, to conclude that *any* amount collected by a local government that does not fall within one of the exceptions enumerated in article XIII C⁴⁵ is necessarily a tax. As we have discussed, because the cable franchise holder committed to provide public access facilities funding in exchange for a cable franchise as part of the state’s franchising process,⁴⁶ we conclude that the public access fee is not a “levy, charge, or exaction . . . imposed by a local government”—that is, a *tax*—within the meaning of article XIII C.

(1990) 221 Cal.App.3d 198, 205-206 (“We note the court reached its decision by ‘reverse logic,’ i.e., if the fee did not meet the requirements of [Government Code] section 50076, then it must be a special tax. That is not the proper approach in this case. If the fee is not the type of exaction which article XIII A was designed to reach, then resort to [Government Code] sections 50075-50077, the enabling legislation for the article, is unnecessary”).

⁴⁵ Cal. Const, art. XIII C, § 1, subd. (e). We have considered whether any of the seven enumerated exceptions to the constitutional definition of local “tax” might apply to the public access fee at issue here, but have concluded that none do.

The first and second exceptions—for a specific benefit conferred or privilege granted directly to the payor, or for a specific government service or product provided directly to the payor (Cal. Const, art. XIII C, § 1, subds. (e)(1) & (e)(2))—would not apply since the fee at issue is tied to the franchise holder’s total gross revenues, rather than being capped so that it “does not exceed the reasonable costs to the local government” of conferring the benefit, granting the privilege, or providing the service or product.

The third exception—for costs paid to a local government for issuing a license (Cal. Const, art. XIII C, § 1, subd. (e)(3))—would not apply since it is the state, not the local government, that issues the franchise.

The fourth exception—for charges “imposed for entrance to or use of local government property” (Cal. Const, art. XIII C, § 1, subd. (e)(4))—would not apply since the Public Utilities Code already imposes a franchise fee of up to 5 percent of the cable providers’ gross revenues that is “payable as rent or a toll for the use of the public rights-of-way by the holders of the state franchise” (Pub. Util. Code, § 5840, subd. (q)(1)). The public access fee is an additional charge aimed at supporting public programming, rather than compensating the public entity for the use of public property.

The fifth, sixth, and seventh exceptions—for fines/penalties, property development fees, and property-related assessments (Cal. Const, art. XIII C, § 1, subds. (e)(5), (e)(6) & (e)(7))—are not implicated here.

⁴⁶ Pub. Util. Code, § 5840, subd. (e)(1)(B)(iv) (cable operator’s application for franchise must include affidavit that operator will provide public access channels “and the required funding as required by Section 5870”).

Federal preemption concerns

Although we need not reach the issue, we note that a contrary interpretation of Article XIII C would likely raise federal preemption concerns.⁴⁷ Congress may preempt state law by expressly stating its intent to do so,⁴⁸ and it has clearly done so with respect to the franchising of cable broadcasting: “any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.”⁴⁹ If a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” the state law must yield.⁵⁰

Among the enumerated aims and objectives of the federal laws governing cable communications are to “assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public,”⁵¹ and to “establish franchise procedures and standards . . . which assure that the cable systems are responsive to the needs and interests of the local community.”⁵² The federal

⁴⁷ The supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2) “invalidates state laws that ‘interfere with, or are contrary to,’ federal law.” (*Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.* (1985) 471 U.S. 707, 712). As we have observed, “The supremacy clause requires that every state provision, *including those enacted by ballot and accorded state constitutional stature*, conform to federal constitutional standards. [Citation.] Consequently, both the constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void.” (68 Ops.Cal.Atty.Gen. 209, 220 (1985), italics added.)

⁴⁸ *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Com.* (1983) 461 U.S. 190, 203.

⁴⁹ 47 U.S.C. § 556(c); see *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 (“‘[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case”). Even without an express statement, federal law preempts state law where the two conflict. (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525-526.)

⁵⁰ *Hines v. Davidowitz* (1941) 312 U.S. 52, 67; see also *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 287-289 (state law may be impliedly preempted even where federal statute contains express preemption clause).

⁵¹ 47 U.S.C. § 521(4).

⁵² 47 U.S.C. § 521(2). The congressional findings for the Cable Television Consumer Protection and Competition Act of 1992 indicate that “[t]here is a substantial governmental interest and First Amendment interest in promoting a diversity of views provided through multiple technology media.” (Historical and Statutory Notes, Thomson Reuter’s 47 U.S.C.A. (2014 ed.) foll. § 521, Congressional Findings and Policy: Cable Television

statutes facilitate these goals by allowing franchising authorities to require cable operators to provide channel capacity, facilities, and financial support for public access programming,⁵³ and granting the franchising authority enforcement power over public access requirements.⁵⁴

California's Digital Infrastructure and Video Competition Act advances the federal scheme by requiring public access channels to be available to all subscribers⁵⁵ and to be carried on the basic service tier.⁵⁶ The Act further requires a commitment from prospective franchisees to financially support public access programming facilities as part of the application for a franchise.⁵⁷ Interpreting Proposition 26 as requiring voter approval before a local government may impose this fee, and as depriving local governments of the power to enforce the fee where voters failed to approve it, could be viewed as frustrating Congress's objectives for public access programming.⁵⁸

Several courts have reached similar conclusions when evaluating state and local laws imposing voting requirements on the granting of a cable franchise. For instance, the Oklahoma Constitution dictates that, "No municipal corporation shall ever grant, extend, or renew a franchise, without the approval of a majority of the qualified electors residing within its corporate limits."⁵⁹ State and federal courts in Oklahoma have found this provision preempted by the federal Communications Act.⁶⁰ Likewise, the federal district

Consumer Protection and Competition Act of 1992, ¶ (a)(6); see also *Time Warner Cable of New York City v. City of New York* (S.D.N.Y. 1996) 943 F.Supp. 1357, 1389 [the purposes of the Cable Communications Policy Act "include a desire to respond to local needs, create space for voices that would not otherwise be heard, air programs needed by a community that may not otherwise be commercially viable, and, for governmental channels, show local government at work"].)

⁵³ 47 U.S.C. §§ 531(b), 541(a)(4).

⁵⁴ 47 U.S.C. § 531(c).

⁵⁵ Pub. Util. Code, § 5870, subd. (g)(3).

⁵⁶ Pub. Util. Code, § 5870, subd. (b).

⁵⁷ Pub. Util. Code, § 5840, subd. (e)(1)(B)(iv).

⁵⁸ See *Hines v. Davidowitz*, *supra*, 312 U.S. at p. 67 (state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

⁵⁹ Okla. Const., art. XVIII, § 5(a).

⁶⁰ *Get Real II, L.L.C. v. Paige* (Okla.Civ.App. 2009) 217 P.3d 638, 643; *Cox Communications Central II, Inc. v. Broken Arrow* (N.D. Okla. Mar. 11, 2003, No. 02-CV-741-P0J) 2003 U.S. Dist. Lexis 28254.

court in Colorado has held that federal law preempted a city charter requiring voter approval of any franchise.⁶¹ Consistent with this precedent, we believe that a court could find that allowing voters to decide whether cable franchise holders must fulfill their obligations to support and fund public access programming conflicts with the federal Communications Act's provisions for charging and collecting public access fees,⁶² and frustrates Congress's clearly stated objectives for cable broadcasting to serve local communities and provide a diversity of programming. Our construction of Proposition 26 and the Digital Infrastructure and Video Competition Act avoids this clash altogether.⁶³

Conclusion

We conclude that Proposition 26 does not require voter approval before a county board of supervisors may enact an ordinance that would require a cable television franchise holder providing service in the county to pay a "public, educational, and governmental access fee," equal to one percent of the "holder's gross revenues," to the county as authorized under California's Digital Infrastructure and Video Competition Act.

⁶¹ *Qwest Broadband Services, Inc. v. City of Boulder* (D.Colo. 2001) 151 F.Supp.2d 1236, 1242.

⁶² 47 U.S.C. §§ 531(c), 541(a)(4).

⁶³ See *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 477 (avoiding "constitutional infirmities" is an established rule of statutory construction).